

M AMIR NASIR*a***v.****PP**

HIGH COURT MALAYA, TEMERLOH
VT SINGHAM JC
[CRIMINAL APPEAL NO: 42-7-95 (66-2000)]
23 JUNE 2000

b

CRIMINAL PROCEDURE: Trial - Close of prosecution case - Section 173(f) Criminal Procedure Code - Whether trial court was obliged to make a finding at close of prosecution case - Whether prosecution had proved its case - Inference - Whether appellate court could impute inference that trial court made such finding

c

CRIMINAL PROCEDURE: Retrial - When to be ordered - Proximity of relationship between appellant and victim - Incident happened five years ago - Whether desirable to order retrial - Appellant had served part of the imprisonment sentence - Effect of retrial - Interest of justice to order retrial

d

This was an appeal by the appellant against the conviction and sentence by the Sessions Court, Temerloh on three charges of rape.

e

The main issue in this case is whether the trial court should have make a finding at the close of the prosecution case as to whether the prosecution has established its case beyond reasonable doubt before the appellant was ordered to enter his defence. In the instant case, the learned Sessions Court Judge did not make any finding at the close of the prosecution case as to whether the prosecution had proved its case beyond reasonable doubt before calling the appellant to enter his defence. As the date of the alleged offences were prior to the amendment to s. 173(f) of the Criminal Procedure Code, the standard of proof was beyond reasonable doubt.

*f**g***Held:**

[1] It is the duty of the trial judge to state at the close of the prosecution case that the accused was ordered to enter his defence because the prosecution had established the charges against him on the required standard of proof. If no such finding is made, the accused was not obliged to enter his defence.

h

[2] As the learned trial judge did not make any finding which he was obliged to do at the close of the prosecution case as to whether the prosecution had proved his case on the required standard of proof, the appellate court was not in a position to know whether the appellant was ordered to enter his defence for the sake of explanation or for any other reason.

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- a* [3] The court cannot and will not make any such inference as proposed by the learned deputy public prosecutor as what was in the mind of the learned Sessions Court Judge when His Honour ordered the appellant to enter his defence. Inferences whatever may be the case could only be made from a set of facts before the court and not based on speculation.
- b* Therefore the court rejects the proposed inference to be made as it is not sustainable.

- c* [4] In order to treat the words of the victim SP10 to her uncle SP1 as a complaint, that complaint ought to have been made voluntarily and spontaneously and not in consequence of any kind of questioning or coaxing as it was admitted in this case. In the circumstances, the evidence of SP10 including the police report made by SP1 and marked as exh. P1 on what SP10 had related to SP1 is not a complaint and cannot even be considered as statement under s. 157 of the Evidence Act 1950.

- d* [5] On the totality of the evidence adduced on behalf of the prosecution, it was not safe to have called the appellant to enter his defence as the evidence was not satisfactory and supported by any independent evidence.

- e* [6] The onus of proof never changes and remains throughout on the prosecution to establish the charges against the appellant on a beyond reasonable doubt.

- f* [7] The court did not order a retrial as the alleged offences took place about 5 1/2 years ago. Moreover, the appellant had served his sentence up to nearly five years and it was also not desirable for the victim to go through another ordeal to repeat her evidence against the appellant.

[Appeal allowed; conviction and sentence set aside; appellant acquitted and discharged; no retrial ordered.]

Case(s) referred to:

- g* *Ah Mee v. PP* [1967] 1 MLJ 220 (*refd*)
Arulpragasam Sandaraju v. PP [1996] 4 CLJ 597 (*refd*)
Ibrahim v. PP [1962] 28 MLJ 235 (*refd*)
Ibralebbe v. Reg [1964] 1 All ER 251 (*refd*)
Khoo Hi Chiang v. PP & Another Case [1994] 2 CLJ 151 (*refd*)
PP v. Saimin & Ors [1971] 2 MLJ 16 (*refd*)
- h* *Tai Chai Keh v. PP* [1948-49] MLJ Supp 105 (*refd*)

Legislation referred to:

Criminal Procedure Code, ss. 173(f), 257, 422
Evidence Act 1950, s. 157

- i* *Accused in person*

Reported by SR Vishnu

JUDGMENT**VT Singham JC:**

This was an appeal against the decision of the Sessions Court, Temerloh wherein the appellant was convicted for offences of rape on his stepdaughter on three different occasions. He was convicted and sentenced on 19 July 1995 to 15 years imprisonment and 10 strokes of the rotan on the first charge and on the second charge he was sentenced to 15 years imprisonment and ordered to be given 10 strokes of the rotan and both the sentences were ordered to run concurrently. On the third charge, the appellant was also sentenced to 15 years imprisonment and ordered to be given 10 strokes of the rotan and the sentence was ordered to run consecutively after the appellant had served the concurrent sentence on the first and second charges. The appellant was not satisfied with the decision of the Sessions Court and hence this appeal.

Charge

The appellant was charged as follows:

Pertuduhan Pertama:

Bahawa kamu antara 29hb. Oktober, 1994, hingga 30/10/94 lebih kurang jam 11.00 malam, di-Rumah No 454, Felda Chemomoi, Manchis, di dalam Daerah Bentong, di dalam Negeri Pahang, telah merogol seorang perempuan nama ROHANA BINTI ABU BAKAR KP. NO. A3179357, oleh itu kamu telah melakukan suatu kesalahan dan boleh di hukum di bawah Seksyen 376 Kanun Kesiksaan.

Pertuduhan Kedua:

Bahawa kamu pada 3/11/94, jam lebih kurang 11.30 malam, di-Rumah No. 454, Felda Chemomoi, Manchis, di dalam Daerah Bentong, di dalam Negeri Pahang, telah merogol seorang perempuan nama ROHANA BINTI ABU BAKAR, KP. NO. A3179357, oleh itu kamu telah melakukan suatu kesalahan dan boleh di hukum di bawah Seksyen 376 Kanun Kesiksaan.

Pertuduhan Ketiga:

Bahawa kamu pada 29hb. November, 1994, jam lebih kurang 3.00 petang, di Rumah No. 454, Felda Chemomoi, Manchis, di dalam Daerah Bentong, di dalam Negeri Pahang, telah merogol seorang perempuan nama ROHANA BINTI ABU BAKAR, KP. NO. A3179357, oleh itu kamu telah melakukan suatu kesalahan dan boleh di hukum di bawah Seksyen 376 Kanun Kesiksaan.

a At The High Court (Appellate Jurisdiction)

The appeal came before this court on 9 June 2000. The appellant was not represented by counsel and the learned deputy public prosecutor was En. Iskandar Ali b. Dewa who represented the respondent/public prosecutor. Infact, the appellant was also not represented by counsel during the trial at the Sessions Court, Temerloh. The notice of appeal was filed on 27 July 1995 by the appellant through the Prison Department, Kajang where the appellant was serving his sentence. The appellant had also filed the petition of appeal dated 12 August 1996 through Prison Department, Kajang. At the outset of the appeal, the appellant informed this court that he only wished to proceed in respect of his sentence and he did not know whether he had appealed against the conviction and sentence. However, as the notice of appeal which was filed by the appellant was against both the conviction and sentence and as this court found that the trial court did not address its mind as to whether the prosecution had or had not established the charges against the appellant beyond reasonable doubt, this court proceeded to hear the appeal as per the notice of appeal which were against both the conviction and sentence.

A perusal of the printed evidence on record, however has led this court in grave doubt about the guilt of the appellant. This court is of the view that it is the duty of this court sitting as an appellate jurisdiction to see that, in the last resort, justice as not only done but seen to be done and any miscarriage of justice be rectified. Viscount Radcliffe said in *Ibralebbe v. Reg* [1964] 1 All ER 251 at 257 justice is owed: "it is not granted by favour or accorded at discretion". In this case, even though the appellant had informed at the outset of the appeal that he only wished to proceed against his sentence, this court cannot be seen to be wearing blinkers and just proceed to decide on the sentence when the learned Sessions Court Judge had not made the finding at the close of the prosecution case before the appellant was ordered to enter his defence.

At the close of the prosecution case and after 11 witnesses for the prosecution had testified, the learned Sessions Court Judge had only this to state:

- h* Mahkamah: keputusan peringkat pendakwaan.
Pembelaan dipanggil atas ketiga-tiga pertuduhan pindaan.
Tertuduh: saya tidak tahu untuk membela.
Mahkamah: 3 cara pembelaan diterangkan kepada Tertuduh oleh Mahkamah melalui Jurubahasa. Tertuduh pilih untuk beri keterangan secara bersumpah.
- i* Kes Pembelaan.

Finding At The Close Of The Prosecution Case

In his grounds of judgment which was written on 1 August 1996, the learned Sessions Court Judge did not state whether at the close of the prosecution case, the three charges against the appellant was proved beyond reasonable doubt or in any standard of proof. The standard of proof in this case against the appellant was beyond reasonable doubt as the date of the offences alleged have been committed by the appellant were prior to the amendment to s. 173(f) of the Criminal Procedure Code which came into effect on 31 January 1997. In his grounds of judgment, the learned Sessions Court Judge had merely stated that he was satisfied that the three instances of rape on the victim SP10 was committed as stated in the charge on the date and time. The learned Sessions Court Judge did not make any finding which he was obliged to do at the close of the prosecution case as to whether the prosecution had or had not proved the charges against the appellant beyond reasonable doubt. This court is of the view that without this basic finding by the trial court at the close of the prosecution case, the appellate court will not be in a position to know whether the appellant was ordered to enter his defence for the sake of hearing an explanation from the appellant or for any other reason which only was within the knowledge of the learned Sessions Court Judge. It is the duty of the trial court in this case in a summary trial to at least state at the close of the prosecution case if an accused person was ordered to enter his defence because the prosecution had established the charges against the accused either on the standard of beyond reasonable doubt or on *prima facie*, depending on which standard of proof applies to the case, in this case, the standard of proof as stated above was the standard of proof beyond reasonable doubt.

The learned deputy public prosecutor was honest and replied without any hesitation when questioned by this court whether the learned Sessions Court Judge had made any finding at the close of the prosecution case as to whether the prosecution had proved its case beyond reasonable doubt. The learned deputy public prosecutor replied that he could not find anywhere in the notes of evidence or in the grounds of judgment on this compliance of the law. Nevertheless, the learned deputy public prosecutor tried to persuade this court to draw an inference that the learned Sessions Court Judge must have at the close of the prosecution case made such a finding that the prosecution had proved its case beyond reasonable doubt. The learned deputy public prosecutor also pointed out to this court that since the learned Sessions Court Judge had informed the appellant the evidence of the prosecution as required under s. 257 of the Criminal Procedure Code as the accused was unrepresented by counsel, he must have come to such

- a* a conclusion that the prosecution had proved its case beyond reasonable doubt. This court cannot agree with such proposition as the mandatory requirement of s. 257 of the Criminal Procedure Code was entirely for a different and specific situation whereas the requirement of the trial court to find at the close of the prosecution case was a requirement in all
- b* criminal cases and in this case, in a summary trial. This court cannot and will not make any such inferences as to what was in the mind of the learned Sessions Court Judge when he ordered the appellant to enter his defence. Inferences whatever it may be, could only be made from a set of facts before the court and not to read or impute such inference into the
- c* mind of the trial court, in this case, the Sessions Court Judge. Such imputation will only amount to speculation which in law cannot be a finding by the trial court. Therefore, this court rejects the proposition by the learned deputy public prosecutor as it is unsustainable.

d ***Whether The Prosecution Has Established Its Case Beyond Reasonable Doubt***

- e* As to the evidence of the prosecution witnesses, notwithstanding that the trial court did not make a finding or ruling at the close of the prosecution case as to whether the prosecution had succeeded in establishing its case against the appellant, this court is of the view that the evidence was not satisfactory and left several gaps unanswered in order to prove the charges against the appellant beyond reasonable doubt. Amongst the gaps and unsatisfactory features were as follows.

- f* The victim who was a Form 6 student at the time of the alleged incident did not complain to her mother of such incident even though her mother was with her during all those dates and lived in the same house. The appellant was the victim's stepfather and was married to her natural mother when her father had passed away. According to SP1, who is the victim's uncle, he went to the victim's house on 29 November 1994 at about
- g* 7.30pm to fetch her at Felda Chemomoi near Triang as the school was resuming the next day after school holidays for about one month. The victim had returned home on 15 October 1994 from her hostel at Sekolah Menengah Tinggi Agama, Pekan, Pahang for the school holidays. SP1 had testified that when he went to fetch the victim from her house, the victim's
- h* mother had informed him that the victim was not well. As three nights prior to 29 November 1994, some eggs and 'kemenyan' were thrown into her house which illness was not related to the alleged rape. SP1 had testified that on taking the victim to his house which was about 1/2 kilometres away from the victim's mother's house, he asked the victim
- i* whether she was really sick or not and it was at that stage that she had informed him that her stepfather, the appellant had raped her. He asked

her when the rape took place and she replied the last incident was on 29 November 1994 and he immediately lodged a police report. There was no evidence as to why the victim herself being a Form 6 student did not lodge a police report on that day instead of her uncle although she had accompanied her uncle SP1 to the police station. The police report lodged by her uncle was marked as exh. P1. Under cross-examination by the appellant, SP1 had admitted that he had ill feelings towards the appellant because the appellant had finished all the money belonging to his sister ie, the mother of the victim. On further cross-examination by the appellant, SP1 said as follows:

S: Kamu sakit hati, lalu tekan saya?

J: Betul sakit hati, tapi bila berlaku perkara ini, saya repot polis.

S: Adakah dia menjerit semasa dirogol?

J: Dia tak dapat cerita dengan betul kerana dia menangis seketika beritahu saya.

However, under re-examination, SP1 qualified his earlier statement by stating that the victim had related to him, only then he made the police report and not because he had ill feelings. On being further questioned by the court, SP1 had stated that at the time when he lodged the police report, he had taken the victim along with him and yet there was no evidence why she herself did not lodge the police report and this remain unanswered although there was nothing to prevent her uncle SP1 from lodging the police report.

The Evidence Of The Victim's Mother SP6

The evidence of the victim's mother SP6 also does not support the story of SP1. According to SP6 the victim's mother, she had stated that she did not know if anything had taken place at the time when the victim was back home from school holidays on 15 October 1994. SP6 had also testified that the victim was as usual with her. The victim did not complain anything to her. SP6 also did not suspect anything. SP6 had also testified that when the police came to her house with the victim, the night after SP1 had lodged the police report, the appellant was at home. SP6 had stated that the victim had informed her after she had returned from the police station that she could not relate anything to her. **"Rohana beritahu – dia tak ada apa lagi. Saya tak ingat apa dia cerita lagi. Dia hanya menangis sahaja. Bila dia kata tak ada apa-apa, saya tahu bahawa dia dirosakkan oleh pakcik dia"** (speculation – emphasis is mine). She referred the **pakcik** as the appellant.

a *The Evidence Of The Medical Officer SP7*

The evidence of the medical officer SP7 was also not conclusive to support the charge of rape as *inter alia* the medical officer who examined the victim on 30 November 1994 at 1.15pm has stated that:

- b** Dibahagian kemaluan
- observation – didapati tiada kesan luka dan lebam
 - pemeriksaan lanjut – didapati selaput darah – keseluruhannya
- c** – ia bukan koyak baru. Dia koyak lama.
- Dalam rahim – tiada luka tapi terdapat – lendir dalam rahim.

The Evidence Of The Victim SP10

- d** She has testified that the accused had sexual intercourse with her under the pretext of curing her illness. The appellant committed the offence on 29 or 30 October 1994 at late night 11pm. She did not scream. She did not relate the incident to anyone. On the other hand, she has also stated that the last time the accused had sexual intercourse with her was on 29 November 1994 at about 3pm. She did not relate the incident to her
- e** mother. She has stated that on 29 November 1994 at about 7.30pm, her uncle SP1 came to her house to invite her to his house to discuss about school matters and at that time, her mother informed her uncle that she was not well. At first, she did not want to follow SP1 but when he forced her, she was frightened and followed him. She was frightened because the
- f** appellant told her she could not go out from the house but she still followed SP1 because he forced her. He then followed her on his motorcycle. On reaching SP1's house, SP1 told her to relate what had happened in her house. At first, she could not relate. She cried and after that, when she was coaxed only then she related what had happened. SP1
- g** had asked her what the appellant had done to her and she related. SP1 then requested her to have a bath and after that she went upstairs in his house and watched television with her aunt. Later, she was taken to the police station where SP1 had lodged the police report.
- h** Under cross-examination by the appellant, the victim had testified that she was forced by SP1 to follow him on 29 November 1994 and that SP1 coaxed her to relate what had happened to her. The appellant challenged the victim that on 29 November 1994 that he was not at her house but he was at Kuala Lumpur to which she denied. On further cross-examination by the appellant, the victim replied accordingly:
- i**

S: Bolehkah buat rogol, ketika orang ramai di rumah. a

J: Tak boleh, tapi Tertuduh buat tengah malam orang dah tidur. Dalam semalam, kadang-kadang 1 kali, kadang-kadang 2 kali.

S: Mustahil orang lain tak tahu?

J: Tak mustahil – orang telah tidur, orang tak nampak. b

S: Sebab kamu tak suka saya dan tak suka saya sama anak kamu berkahwin?

J: Saya memang tak suka kamu sebab kamu rogol saya. Saya tak suka Tertuduh sebab, Tertuduh sudah ada anak 7 orang. c

S: Kamu sakit hati buat alasan?

J: Saya sayang kamu, tapi kamu (Tertuduh) suami ibu saya.

S: Kamu tak suka – sebab subahat dengan pakcik Musa (SP1) tahan saya?

J: Musa memang tak suka Tertuduh, tapi dia tak subahat dengan saya. d

Semenjak kahwin dengan emak saya, saya tak suka Tertuduh.

Under cross-examination, the victim further reiterated:

Saya tak suka dengan Tertuduh – sejak kahwin dengan emak **but** she went on to state that “perkara rogol ini memang benar berlaku. Kalau tak suka pun, saya tak akan lapur kepada polis kalau perkara kejadian ini tak berlaku.” e

Chemist Report

This court also found that the chemist report tendered and marked as exh. P4 in respect of the clothings belonging to the victim and the appellant also did not render much assistance to the prosecution case. f

Review Of Entire Evidence Of The Prosecution

Be that as it may, even if this court were to review the entire evidence of the prosecution, notwithstanding that the trial court did not make any finding at the close of the prosecution case, this court is of the view that it was still unsafe to have called the accused to enter his defence in that: g

[1] there was no reasonable explanation advanced by the victim as to why she did not relate the incident to her mother as her mother was at all times with her during the dates of the incident; h

[2] there was no reason advanced by SP10 the victim, as to why she had to wait for her uncle SP1 to coax her before she related the incident to him;

[3] she did not on her own volition lodge the police report even though she went with her uncle SP1 to the police station on the night on 29 November 1994; i

- a* [4] both the evidence of SP1 and the victim SP10 seemed to suggest that they both had ill feelings towards the appellant because he had married SP6 the mother of the victim and he had taken away her money and that he was a married man with seven children;
- b* [5] there was no independent corroboration to implicate the appellant (*Ah Mee v. PP* [1967] 1 MLJ 220).

Whether Information Given By SP10 To SP1 Amount To Complaint Or Statement

- c* This court is of the view that the words said by SP10 to her uncle SP1 cannot amount to a complaint because SP10 had admitted that she was questioned and coaxed by SP1 when he fetched her to his home from her mother's house. This court is of the view that in order to treat the words of SP10 to her uncle SP1 as a complaint that complaint ought to have been made voluntarily and spontaneously and not in consequence of any kind
- d* of questioning in any manner or coaxing as it was admitted in this case. In the circumstances, the evidence of SP10 including the police report made by SP1 and marked as exh. P1 on what SP10 had related to SP1 is not a complaint and cannot even be considered as a statement under s. 157 of the Evidence Act 1950.

e ***Grudge Against Appellant/Effect Of More Than One Inference***

- Consequently, there is no corroboration by any of the witnesses for the prosecution to the allegation by SP10 which in her own evidence shows that she had a grudge against the appellant and coupled with the evidence
- f* of SP1 who has also admitted that he has a grudge against the appellant. In a criminal trial, if there is more than one inference which can reasonably be drawn from a set of facts, the inference most favourable to the accused should be adopted (*Tai Chai Keh v. Public Prosecutor* [1948-49] MLJ Supp. 105).

g ***Totality Of The Evidence On Behalf Of The Prosecution***

- On the totality of the evidence adduced by the prosecution which was not satisfactory and not supported by any independent evidence and coupled with the fact that the learned Sessions Court Judge did not make any finding or ruling at the close of the prosecution case as to whether the prosecution had established its case beyond reasonable doubt, this court finds that it was not safe to have called the appellant to enter his defence. Unless and until the learned Sessions Court Judge had made this specific finding on the standard of proof at the close of the prosecution case the
- h* appellant was not obliged to enter his defence and it has been held in the case of *Ibrahim v. Public Prosecutor* [1962] 28 MLJ 235:
- i*

The defence should not be called where the prosecution has failed to prove its case. Under no circumstances should a Magistrate call for the defence merely to clear any doubt he may have in his mind as to whether the prosecution had or had not proved its case.

a

In the case of *Public Prosecutor v. Saimin & Ors* [1971] 2 MLJ 16 at 17, the High Court held that:

b

It is the duty of the prosecution to prove the charge against the accused beyond all reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer. The proof of a case against the accused depends for its support not upon the absence or weakness of the explanation, on his part but on the positive affirmative evidence of his guilt given by the prosecution. Numerous rules have from time to time been suggested by the courts when dealing with the question of the guilt or innocence of the accused.

c

The following principles are not only sound but well recognised in practise:

d

(1) The onus of proving everything essential to the establishment of the charge against the accused lies on the prosecution;

(2) The evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused;

e

(3) In matters of doubt it is safer to acquit than to condemn.

A conviction cannot be sustained even if the court is satisfied that the prosecution story “may be true” unless and until it is found that the prosecution story “must be true.” The burden of proof remains on the prosecution throughout the trial. If the learned magistrate was not satisfied with the case of the prosecution it was his duty to acquit and discharge the accused at the close of the prosecution case. The falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt.

f

Trial Court To Evaluate The Evidence Of The Prosecution

g

Infact it was the duty of the learned Sessions Court Judge to have evaluated the evidence tendered by the prosecution in order to determine whether or not the prosecution had established the charges against the appellant beyond all reasonable doubt. In the case of *Khoo Hi Chiang v. Public Prosecutor & Another Case* [1994] 2 CLJ 151 at 172, the Federal Court *inter alia* said that:

h

the duty of the Court, at the close of the case for the prosecution, is to undertake, not a minimal evaluation of the evidence tendered by the prosecution in order to determine whether or not the prosecution evidence is inherently incredible – the *Haw Tua Tau* test – but a maximum evaluation of such evidence, to determine whether or not the prosecution has established the charge against the accused beyond all reasonable doubt.

i

- a* All that the learned Sessions Court Judge had said in this case was after the close of the defence case and that he does not doubt that the victim SP10 had said the truth because she was a Form 6 student at Sekolah Tinggi Agama Sultan Abu Bakar, Pekan. The learned Sessions Court Judge also at the end of the defence case had stated that he was satisfied that
- b* the evidence of the appellant did not raise any doubt on the prosecution case and that he found that all the three charges had been proved beyond any reasonable doubt. The learned Sessions Court Judge seemed to have reversed the burden of proof which was on the prosecution to the defence which is not the correct position in law in a criminal trial and this onus
- c* never changes. Also, the finding of the learned Sessions Court Judge that the victim SP10 had said the truth because she was a Form 6 student is not sustainable and ought to be disregarded.

In another case *Arulpragasam a/l Sandaraju v. Public Prosecutor* [1996] 4 CLJ 597 at 612, the Honourable Chief Justice Eusoff Chin CJ in His

- d* Lordship's majority judgment said:

When the case for the prosecution is concluded, it is the duty of the court to scrutinize and evaluate the evidence and to decide whether or not there is a case for the accused to answer. If there is no case to answer, the court will acquit and discharge the accused person. If there is a case to answer, then the

- e* court will call on the accused to enter on his defence.

Retrial

- Even assuming for a moment that there was sufficient evidence by the prosecution to establish all the three charges against the appellant and notwithstanding the omission by the learned Sessions Court Judge to make any finding at the close of the prosecution case as to whether the prosecution had established the charges against the accused beyond reasonable doubt or even if this omission was curable under s. 422 of the Criminal Procedure Code, this court did not propose to order a retrial for
- f* the following reasons:
- g*

[1] the dates in the alleged charges were in October and November 1994 which was about 5 1/2 years ago;

- h* [2] the accused was sentenced to imprisonment on 19 July 1995 and he had already served his sentence up to nearly five years at Kajang Prison;

- i* [3] the victim at the time of the alleged offences was a Form 6 student and at the time of giving evidence in court on 17 July 1995 was 20 years old and was studying at High School Ugama. Therefore, it was not appropriate or in the interest of both parties to reopen old wounds bearing in mind their relationship as stepfather and stepdaughter and that this

incident took place about 5 1/2 years ago. Opening up old wounds will only result in blisters which is not healthy for both parties. Also, it will not be desirable for the victim who presently must be 24 years old probably working to go through another ordeal to repeat her unpleasant experience as alleged against the appellant and when considering the nature of the alleged offences.

Under the circumstances, this court did not order a retrial. The learned deputy public prosecutor when asked by this court what he proposed to submit on the retrial, as to whether a retrial ought to be ordered, he replied that he left it to the discretion of this court.

The appeal by the appellant was allowed and his conviction and sentence was set aside. The appellant was acquitted and discharged on all the three charges of rape. There was no order for a retrial.

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